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CHRISTIN NIRMAL v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
SURAYA OTHMAN JCA
YEOH WEE SIAM JCA
B [CRIMINAL APPEAL NO: B-05-161-04-2017 (FJI)]
12 JULY 2018

CIVIL PROCEDURE: *Courts – Jurisdiction – Jurisdiction of High Court – Accused person charged under s. 39B(1)(a) of Dangerous Drugs Act 1952 ('DDA')*
C *for trafficking in dangerous drugs – Offence punishable by mandatory death upon conviction – Accused person sought High Court to refer constitutional questions to Federal Court – Whether mandatory death sentence provided for by s. 39B of DDA inconsistent with arts. 5 and 8 of Federal Constitution – Whether s. 39B of DDA arbitrary, disproportionate and fails to take into account individual mitigating*
D *circumstances – Whether imperative for High Court to refer purported constitutional questions to Federal Court for decision – Whether High Court seized with jurisdiction to dismiss accused person's application – Courts of Judicature Act 1964, s. 84*

CONSTITUTIONAL LAW: *Fundamental liberties – Breach of – Constitutionality*
E *of provision – Accused person charged under s. 39B(1)(a) of Dangerous Drugs Act 1952 ('DDA') for trafficking in dangerous drugs – Offence punishable by mandatory death upon conviction – Whether mandatory death provided for by s. 39B of DDA inconsistent with arts. 5 and 8 of Federal Constitution – Whether s. 39B of DDA arbitrary, disproportionate and fails to take into account individual mitigating*
F *circumstances – Whether s. 39B(1)(a) of DDA valid – Courts of Judicature Act 1964, s. 84*

CRIMINAL LAW: *Offences – Trafficking in dangerous drugs – Accused person charged under s. 39B(1)(a) of Dangerous Drugs Act 1952 ('DDA') for trafficking in dangerous drugs – Offence punishable by mandatory death upon conviction –*
G *Whether mandatory death sentence provided for by s. 39B of DDA inconsistent with arts. 5 and 8 of Federal Constitution – Whether s. 39B(1)(a) of DDA valid*

The appellant, a Fijian national, was charged for trafficking in dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable with the mandatory death sentence pursuant to
H s. 39B(2) of the DDA. The appellant filed a notice of motion, pursuant to s. 84 of the Courts of Judicature Act 1964 ('CJA'), challenging the validity of s. 39B(1)(a) of the DDA. The appellant sought the High Court to refer to the Federal Court the constitutional questions of whether the mandatory death penalty for trafficking in a dangerous drug provided for by s. 39B of
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the DDA, was inconsistent with (i) art. 5(1) of the Federal Constitution ('FC') which provides that 'No person shall be deprived of his life … save for in accordance with the law' and was therefore void under art. 4(1) of the FC; (ii) art. 8 of the FC which provides that 'All persons are equal before the law and entitled to the equal protection of the law' and was therefore void under art. 4(1) of the FC; and (iii) the FC for being arbitrary and disproportionate and for failing to take into account individual mitigating circumstances ('the third question'). Dismissing the application and ordering the case to proceed with trial, the High Court Judge ('HCJ') held that, *inter alia*, the third question was not a special case, as stated in s. 84 of the CJA, where His Lordship had to refer the third question to the Federal Court. Hence, the present appeal which is limited to the third question only. The issue that arose was whether the HCJ was correct in his exercise of discretion, under s. 84 of the CJA, in not allowing the appellant's application and transmitting the third question to the Federal Court for a decision.

Held (dismissing appeal)
Per Yeoh Wee Siam JCA delivering the judgment of the court:

(1) The HCJ was not plainly wrong, nor had His Lordship erred in fact or in law in deciding that the present case was not a special case under s. 84 of the CJA, which made it imperative for him to refer the purported constitutional questions, in particular the third question, to the Federal Court for a decision. The questions were not new, as could be seen from the numerous cases which had been decided on the matter. (para 31)

(2) Even though the High Court, and the Court of Appeal, had no jurisdiction to decide on the constitutionality of the third question, the mere filing of the application under s. 84 of the CJA, was not an automatic right of the appellant, and therefore, not the automatic duty of the High Court to refer the purported constitutional questions to the Federal Court for a decision if the application did not pass the 'special case' test, stipulated in s. 84 of the CJA and rr. 32 and 33 of Rules of the Federal Court 1995. (paras 23 & 36)

(3) There was no merit in the appeal. This court shall not exercise its powers under r. 76 of the Rules of the Court of Appeal 1994 to refer the constitutional questions to the Federal Court. It was also not necessary for this court to order the case to be remitted to the High Court for the High Court to refer the questions, in particular the third question, to the Federal Court for a decision pending the trial. The decision of the High Court was affirmed. (paras 38 & 41)

(4) The function of the courts is to interpret the law and not to declare the mandatory death penalty, under the impugned provisions of the DDA, as unconstitutional. It is the Legislature, being the policy-maker, which has to amend the DDA and abolish the mandatory death sentence if it thinks that it is cruel and harsh and a draconian law which is not keeping with international trends and is inconsistent with the FC for being arbitrary and disproportionate and for failing to take into account individual mitigating circumstances. (para 39)

Bahasa Malaysia *Headnotes*

Perayu, seorang warganegara Fiji, dituduh mengedar dadah, satu kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya ('ADB') dan boleh dijatuhkan hukuman mati mandatori bawah s. 39B(2) ADB. Perayu memfailkan notis usul, bawah s. 84 Akta Mahkamah Kehakiman 1964 ('AMK'), mencabar kesahan s. 39B(1)(a) ADB. Perayu memohon agar Mahkamah Tinggi merujuk, pada Mahkamah Persekutuan, soalan-soalan berperlembagaan iaitu sama ada hukuman mati mandatori untuk pengedaran dadah berbahaya yang diperuntukkan oleh s. 39B ADB, tidak selari dengan (i) per. 5(1) Perlembagaan Persekutuan ('PP') yang memperuntukkan 'Tiada seorang pun boleh diambil nyawanya ... kecuali mengikut undang-undang' dan, dengan itu, tidak sah bawah per. 4(1) PP; (ii) per. 8 PP yang memperuntukkan 'Semua orang adalah sama rata di sisi undang-undang dan berhak mendapat perlindungan yang sama rata di sisi undang-undang' dan, dengan itu, tidak sah bawah per. 4(1) PP; dan (iii) PP kerana bersifat sembarangan dan tidak seimbang dan gagal mengambil kira hal-hal keadaan mitigasi individu ('soalan ketiga'). Menolak permohonan tersebut dan mengarahkan agar kes terus dibicarakan, Hakim Mahkamah Tinggi ('HMT') memutuskan, antara lain, soalan ketiga bukan kes khas, seperti dinyatakan dalam s. 84 AMK, hinggakan beliau perlu merujuk soalan ketiga pada Mahkamah Persekutuan. Maka timbul rayuan ini yang terhad pada soalan ketiga sahaja. Isu yang timbul ialah sama ada HMT menggunakan budi bicara beliau dengan betul, bawah s. 84 AMK, dalam tidak membenarkan permohonan perayu dan merujuk soalan ketiga pada Mahkamah Persekutuan untuk diputuskan.

Diputuskan (menolak rayuan)
Oleh Yeoh Wee Siam HMR menyampaikan penghakiman mahkamah:

(1) Hakim Mahkamah Tinggi tidak terkhilaf langsung, mahupun terkhilaf secara fakta atau undang-undang, dalam memutuskan kes ini bukan kes khas bawah s. 84 AMK, yang menjadikannya satu kemestian agar beliau merujuk soalan-soalan, yang dikatakan berperlembagaan, khususnya soalan ketiga, pada Mahkamah Persekutuan untuk diputuskan. Soalan-soalan tersebut bukanlah baharu, seperti yang dapat dilihat dalam banyak kes yang telah memutuskan tentang hal perkara ini.

(2) Walaupun Mahkamah Tinggi, dan Mahkamah Rayuan, tiada bidang kuasa memutuskan keperlembagaan soalan ketiga, tindakan sekadar memfailkan permohonan tersebut bawah s. 84 AMK bukan hak automatik perayu dan, dengan itu, bukan tanggungjawab automatik Mahkamah Tinggi untuk merujuk soalan-soalan, yang dikatakan berperlembagaan, pada Mahkamah Persekutuan untuk diputuskan jika permohonan tersebut tidak lulus ujian 'kes khas', yang dinyatakan dalam s. 84 AMK serta kk. 32 dan 33 Kaedah-Kaedah Mahkamah Persekutuan 1995.

(3) Tiada merit dalam rayuan ini. Mahkamah ini tidak akan menggunakan kuasanya bawah k. 76 Kaedah-Kaedah Mahkamah Rayuan 1994 untuk merujuk soalan-soalan berperlembagaan pada Mahkamah Persekutuan. Mahkamah ini juga tidak perlu mengarahkan kes ini dikembalikan ke Mahkamah Tinggi agar Mahkamah Tinggi merujuk soalan-soalan tersebut, khususnya soalan ketiga, pada Mahkamah Persekutuan untuk diputuskan sementara perbicaraan. Keputusan Mahkamah Tinggi disahkan.

(4) Fungsi mahkamah-mahkamah ialah mentafsir undang-undang dan bukan mengisytiharkan hukuman mati mandatori, bawah peruntukan-peruntukan ADB yang dipersoalkan, tidak berperlembagaan. Badan perundangan, selaku pembuat polisi, yang seharusnya meminda ADB dan memansuhkan hukuman mati mandatori jika mereka berpendapat ini adalah kejam dan keras dan satu undang-undang yang terlampau berat yang tidak selari dengan aliran antarabangsa dan tidak selaras dengan PP kerana bersifat sembarangan dan tidak seimbang dan gagal mengambil kira hal-hal keadaan mitigasi individu.

Case(s) referred to:

Assa Singh v. Menteri Besar, Johore [1968] 1 LNS 9 FC ***(refd)***
B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 1 LNS 14 PC ***(refd)***
Bachan Singh v. The State of Punjab (1980) 2 SCC 684 ***(refd)***
Gan Boon Aun v. PP [2016] 6 CLJ 647 FC ***(refd)***
Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***
Mithu v. State of Punjab [1983] 2 SCR 690 ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 PC ***(refd)***
Ooi Kean Thong & Anor v. PP [2006] 2 CLJ 701 FC ***(refd)***
PP v. Lau Kee Hoo [1983] 1 CLJ 21; [1983] CLJ (Rep) 336 FC ***(refd)***
PP v. Pung Chen Choon [1994] 1 LNS 208 SC ***(refd)***
PP v. Su Liang Yu [1976] 1 LNS 113 HC ***(refd)***
Reyes v. The Queen [2002] 2 AC 235 ***(refd)***
Watson v. The Queen (Attorney-General for Jamaica Intervening) [2005] 1 AC 472 ***(refd)***
Woodson v. North Carolina 428 US 280 (1976) ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 30(1), 84(1), (2)
Dangerous Drugs Act 1952, ss. 2(1), 39B(1)(a), (2)
Federal Constitution, arts. 4(1), 5(1), 8, 162
Human Rights Commission of Malaysia Act 1999, ss. 2, 4(4)
Rules of the Court of Appeal 1994, r. 76
Rules of the Federal Court 1995, rr. 32, 33

Constitution of the Republic of Singapore [Sing], arts. 9(1), 12(1)
Misuse of Drugs Act (Cap 185) 1973 [Sing], s. 17

For the appellant - Gopal Sri Ram, Chih Yan Leng & Damien Chan; M/s Rashid Zulkifli
For the prosecution - Awang Armadajaya Awang Mahmud, Nurulhuda Nur'Aini Mohd Nor & Nurshafini Mustafha; DPPs

Reported by Najib Tamby

JUDGMENT

Yeoh Wee Siam JCA:

Background Facts

The Appellant's Application

[1] The appellant, a Fijian national, was charged in the Shah Alam High Court ("High Court") under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") for drug trafficking which, upon conviction, is punishable with the mandatory death sentence pursuant to s. 39B(2) of the same Act.

[2] On 21 October 2016, the appellant filed a notice of motion under s. 84 of the Courts of Judicature Act 1964 ("CJA") seeking to challenge the validity of s. 39B(1)(a) and s. 39B(2) of the DDA for being inconsistent with arts. 5 and 8 of the Federal Constitution ("application").

The Three Constitutional Questions In The Application

[3] The appellant by the application sought the High Court to refer the following three constitutional questions to the Federal Court regarding s. 39B(1)(a), read together with s. 39B(2), of the DDA ("the three questions"):

(i) whether the mandatory death penalty for trafficking in a dangerous drug provided for by s. 39B of the DDA is inconsistent with art. 5(1) of the Federal Constitution which provides that "[n]o person shall be deprived of his life … save in accordance with the law" and is therefore void under art. 4(1) of the Federal Constitution. ("first question");

(ii) whether the mandatory death penalty for trafficking in a dangerous drug provided for by s. 39B of the DDA is inconsistent with art. 8 of the Federal Constitution which provides that "[a]ll persons are equal before the law and entitled to the equal protection of the law" and is therefore void under art. 4(1) of the Federal Constitution. ("second question");

(iii) whether the mandatory death sentence for trafficking in a dangerous drug provided for by s. 39B of the DDA is inconsistent with the Federal Constitution for being arbitrary and disproportionate and for failing to take into account individual mitigating circumstances. ("third question");

Decision Of The High Court

[4] On 31 March 2017, the High Court gave the decision to dismiss the application and ordered that the appellant's case be proceeded with at the trial as fixed.

Appeal Before This Court

[5] The appellant, by way of his notice of appeal dated 31 March 2017, appealed to this court against the whole of the decision of the High Court for dismissing the application on the three questions ("appeal").

Decision Of This Court

[6] On 12 February 2018, after having heard the submissions of learned counsels of both parties and perused the appeal record, we made the unanimous decision to dismiss the appeal.

Grounds Of Our Decision

Appeal Limited To The Third Question

[7] At the outset of the hearing, learned counsel for the appellant informed this court that the appellant conceded on the first and second questions and hence would not be appealing on those two questions. The appeal was therefore narrowed down and limited to only the third question.

The Applicable Test

[8] Section 84 of the CJA provides as follows:

> Reference of constitutional question by High Court
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> 84 (1) Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.

A (2) An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the
B proceedings.

(3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a **special case** which so far as may be possible shall state the said question in a form which shall
C permit of an answer being given in the affirmative or the negative.

(4) Where a Judge shall have stated a **special case** under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court. (emphasis added)

[9] It is clear from a reading of the above s. 84, that the test to be applied
D by the High Court in order to determine the application is the test of whether the appellant's case is a "special case" which warrants the High Court to refer the constitutional questions to the Federal Court for a decision.

[10] From a perusal of the grounds of judgment ("judgment") of the learned High Court Judge ("learned judge"), it is also clear that, amongst other
E reasons given, he had applied the correct test and decided that this is not a special case for the High court to refer the three questions to the Federal Court for a decision.

The Appellant's Submissions

F **[11]** Regarding the third question, learned counsel for the appellant submitted that the mandatory death sentence which the court is required by the DDA to impose, upon conviction, is unconstitutional and void for the following reasons which have been succinctly stated in the "appellant's speaking note":

G 2. Prior to its amendment in 1983, the DDA gave the Court a discretion on the issue of sentence by permitting an alternative between life imprisonment and death.

3. By ACT A553 passed in 1983, the Parliament removed the judicial discretion vested in the Court.

H 4. The said amendment is unconstitutional because it violates the doctrine of separation of powers. The Hansard in respect of the recent amendment restoring the original position accepts that the 1983 amendment is unconstitutional.

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5. The power to determine guilt or innocence and power to determine the measure of punishment is a judicial power. See *Public Prosecutor v. Dato' Yap Peng* [2AB Tab 19] and *DPP of Jamaica v. Mollison* [2AB Tab 19].

6. The doctrine of separation of powers is part of the basic structure of the Constitution. (See *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat* [AB Tab 16] and *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak* [AB Tab 13]).

7. The fact that there has been no conviction or death penalty in this case is irrelevant because the test for constitutionality is the possibility of infringement. (See *Chintaman Rao v. The State of Madhya Pradesh* [3AB Tab 32] and *Romesh Thappar v. The State of Madras* [3AB Tab 33]).

8. For the foregoing reasons, the mandatory death penalty which the Court is required to impose by virtue of the DDA is a violation of the judicial power of the Federation which is also part of the basic structure of the Constitution. The amending Act A553 is therefore unconstitutional and void. (See *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak* [AB Tab 13]).

9. The Federal Court in *Gan Boon Aun (No. 1)* [AB Tab 5] has held that the Court of Appeal has no power to refer questions of constitutional law to the former. That decision overlooks Rule 76 of Rules of the Court of Appeal 1994. In any event, this Court is empowered to remit the matter to the High Court with a direction to refer.

The Respondent's Submissions

[12] In brief, the learned Deputy Public Prosecutor ("DPP" or "respondent") opposed the application on the following main grounds.

[13] As decided by the Federal Court in many cases, and citing *Ooi Kean Thong & Anor v. PP* [2006] 2 CLJ 701, as one of them, "the courts have been consistently applying the presumption of constitutionality in favour of impugned statutory provision and to succeed the onus is therefore on the party asserting otherwise to show" (see also Federal Court case, *Public Prosecutor v. Pung Chen Choon* [1994] 1 LNS 208; [1994] 1 MLJ 566, and *Public Prosecutor v. Su Liang Yu* [1976] 1 LNS 113; [1976] 2 MLJ 128).

[14] Under art. 4(1) of the Federal Constitution, "any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void". The DDA was enacted in 1952, before Merdeka Day, and therefore not caught by art. 4(1) to be declared as null and void.

[15] The DDA was enacted in 1952. It is therefore governed by art. 162 of the Federal Constitution. As an existing law, since it was not repealed, it shall continue in force on and after Merdeka Day, with such modifications and subject to any amendments made by Federal or State law (see Federal Court case, *Assa Singh v. Menteri Besar, Johore* [1968] 1 LNS 9; [1969] 2 MLJ 30), and Privy Council case in *B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 LNS 14; [1962] 1 MLJ 169 at p. 171).

[16] The primary object of death penalties in a drug trafficking offence is that society regards the offence with particular abhorrence and the death penalties should act as a deterrent, particularly where the offence is one that is committed for profit by an offender who is prepared to take a calculated risk. The distinction between cases of death penalties and non-death penalties are questions of social policy. Under the Constitution, which is based on the separation of powers, these are questions which are the function of the Legislature to decide, and not of the Judiciary (see the Privy Council decision in *Ong Ah Chuan v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64).

[17] Relying on the Federal Court case in *Loh Kooi Choon v. Government of Malaysia* [1975 1 LNS 90; [1977] 2 MLJ 187, it is for Parliament to decide on the policy of whether the impugned Act is "harsh or unjust", and not a question for judicial determination.

Our Consideration

[18] The law regarding the constitutionality of the said mandatory death sentence under the DDA is trite, having regard to arts. 4, 5, 8 and 162 of the Federal Constitution, and the long line of authorities as cited before us. Nonetheless, we considered the submissions of the appellant on the issues raised.

[19] We agree with learned counsel for the appellant that the decision of the Federal Court in *Gan Boon Aun v. PP* [2016] 6 CLJ 647; [2016] 4 MLJ 265 ought to be applied in the present case, in particular the following:

> [17] *It is our considered view that the Court of Appeal did not have the jurisdiction to hear the respondent's appeal against the decision of the High Court* given on 14 November 2011 in view of the provision of ss. 30 and 84 of the CJA. In the present case the sessions court referred to the High Court under s. 30 of the CJA on the constitutionality of 122(1) of the Act. The High Court declared s. 122(1) of the Act unconstitutional and void. The Court of Appeal allowed the prosecution's appeal and ordered the said decision of the High Court be set aside; and
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> [21] We would take the view that under s. 30 of the CJA the High Court judge has to consider and decide whether there is a question of constitutional issue on matters referred to it by the sessions court necessary for the determination of the proceedings before the sessions

court. If there is none the High Court judge must send the case back for continued hearing before the sessions court. On the other hand *if the High Court finds that a decision on a question as to the effect of a provision of the constitution is necessary for the determination of the proceedings in the sessions court it is the duty of the High Court judge under s. 84 to state the question which in the opinion of the High Court judge had arisen as to the effect of the provision of the constitution in the form of a special case which shall permit of an answer being given in the affirmative or the negative. Once that is done, the High Court judge shall transmit the special case to the Federal Court in accordance with the Rules of the Federal Court.*

[22] *It is to be stated here that nowhere in as 30 and 84 of the CJA is power given to the High court judge to determine a question which concerns the effect of a provision of the constitution which had arisen in the subordinate court and in respect of which the record of proceedings have been transmitted to the High Court by the subordinate court under s. 30 of the CJA. That power belongs to the Federal Court.* (emphasis added)

[20] The above case referred to s. 30 of the CJA. Section 30(1) is the equivalent of s. 84(1) of the CJA except that it is applicable to a reference of a constitutional question by a subordinate court to the High Court. Section 30 of the CJA provides, *inter alia*, as follows:

Reference of constitutional question by subordinate court

30(1) Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court.

(2) Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the Court and where the Judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with section 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen.

[21] As referred to in *Gan Boon Aun (supra)*, and for completeness, we now cite rr. 32 and 33 of the Rules of the Federal Court 1995 ("RFC 1995"):

32 Reference by High Court

(1) Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution the Judge hearing such proceedings may make an order on such terms as may be just staying such proceedings to await the decision of such question by the Federal court.

(2) An order staying proceedings under this rule may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may consider most

A suitable having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final disposal of the proceedings.

33 Special case

B (1) Where an order for stay of proceedings has been made under rule 32 the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case for the opinion of the Federal Court.

(2) The question which has arisen shall be stated in a form which shall C permit of an answer being given in the affirmative or the negative.

(3) Every special case stated under the Rule shall be divided into paragraphs and shall concisely state such facts and shall include such documents as may be necessary to enable the Court to decide the question raised thereby and shall be signed by the Judge.

D **[22]** We note further the following statement of the Federal Court in *Gan Boon Aun (supra)* at pp. 661-664 (CLJ); p. 279 (MLJ):

[23] … Again it is to be noted that rr. 32(1) and (2) read with rr. 33(1) and (2) of the RFC 1995 are substantially similarly worded as in the provision of s. 84 of the CJA.

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[24] It is our considered view that it is plainly obvious that the Legislature has intended to empower only the Federal Court to determine a question as to the effect of any provision of the constitution in a reference under s. 30 of the CJA. The High Court does not have such power.

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[26] It is further noted that rr. 34, 35, 36, 37 and 38 under Part XI of the RFC 1995 entitled 'Special Constitutional Case' contained specific provisions on the mode of dealing with the said special cases.

…

G [32] With respect we are not persuaded by the argument put forward by the learned DPP that the High Court is competent to decide and rule on the constitutionality of any matter transmitted to it by a subordinate court. It is clear now reading the provisions of ss. 30 and 84 of the CJA together with the relevant provisions of the RFC 1995 that it is the intention of the Legislature that jurisdiction and power is vested with the H Federal Court to decide on the constitutionality of any matter that had arisen in the subordinate court and transmitted to the High Court. The High Court does not have the jurisdiction and power to decide on such constitutional issue. It only has the power to decide on such issue if the issue arises for the first time before itself.

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[23] Based on *Gan Boon Aun (supra)*, we fully agree with the submissions of the appellant that the High Court has no jurisdiction to decide on the constitutionality of the third question in the application. Similarly, in the appeal before us, the Court of Appeal does not have the jurisdiction to decide on the constitutionality of the same third question.

[24] However, the issue before this court is whether the learned judge was plainly wrong in his exercise of discretion under s. 84 of the CJA in not allowing the appellant's application and transmitting the third question to the Federal Court for a decision.

[25] In determining this issue, we bear in mind that the High Court decided, amongst others, that the third question is not a special case as stated in s. 84 of the CJA where he had to refer the purported constitutional question to the Federal Court. The learned judge did not think that the question or issue was raised for the first time to require it to be referred by the High Court to the Federal Court. He was guided to a large extent by the Federal Court decision in *Public Prosecutor v. Lau Kee Hoo* [1983] 1 CLJ 21; [1983] CLJ (Rep) 336; [1983] 1 MLJ 157 which followed the decision of the Privy Council in *Ong Ah Chuan v. Public Prosecutor* [1980] 1 LNS 181; [1981] 1 MLJ 64.

[26] In *Ong Ah Chuan*, the Privy Council, on appeal from Singapore, dealt with the constitutionality of s. 15 of the Misuse of Drugs Act 1973 ("MDA") (No. 5 of 1973) (now s. 17 of the MDA (Cap 185, 2008 Rev. Ed.)), and the mandatory death penalty under the said Act for certain offences. The appellants in that case contended that the presumption of trafficking under s. 15 of the MDA violated art. 9(1) of the Constitution of the Republic of Singapore (1980 Reprint) ("Singapore Constitution") and that the mandatory death penalty was arbitrary and violated art. 12(1) of the Singapore Constitution.

[27] Article 9(1) of the Singapore Constitution states that "No person shall be deprived of his life or liberty save in accordance with law". It corresponds with art. 5 of the Federal Constitution of Malaysia on liberty of a person.

[28] Article 12(1) of the Singapore Constitution states that "All persons are equal before the law and entitled to the equal protection of the law". It corresponds with art. 8 of the Federal Constitution of Malaysia on equality.

[29] In a nutshell, the Privy Council in *Ong Ah Chun (supra)* held that the MDA, in particular s. 15 (which provides for the rebuttable presumption of drug trafficking) and the provision in s. 29 and the Second Schedule (which provide for the mandatory death penalty for drug trafficking) are not inconsistent with arts. 9(1) and 12(1) of the Singapore Constitution. In the last two paragraphs of the judgment, Lord Diplock stated:

A In their Lordships' view *there is nothing unconstitutional in the provision for a mandatory death penalty for trafficking in significant quantities of heroin and morphine.* The minimum quantity that attracts the death penalty is so high as to rule out the notion that it is the kind of crime that might be committed by a good Samaritan out of the kindness of his heart as was suggested in the course of argument. But if by any chance it were to B happen, the prerogative of mercy is available to mitigate the rigidity of the law and is the long-established constitutional way of doing so in Singapore as in England.

In the instant cases the law required that sentences of death should be imposed. There is no substance in the contention that this requirement of the law is inconsistent with C *the Constitution.* The appeals must be dismissed. (emphasis added)

[30] In *Lau Kee Hoo (supra)*, the Federal Court considered the following question:

Whether or not the mandatory death sentence provided under section 57(1) of the Internal Security Act, 1960, is *ultra vires* and violates Articles D 5(1), 8(1) and 121(1) of the Federal Constitution.

The Federal Court then held, *inter alia*, as follows:

Held:(1) it is clear from article 5(1) of the Federal Constitution that the Constitution itself envisages the possibility of Parliament providing for the E death penalty so that it is not necessarily unconstitutional;

…

(4) Capital punishment is not unconstitutional *per se*. In their judicial capacities judges are in no way concerned with arguments for or against capital punishment. Capital punishment is a matter for Parliament. It is not F for judges to adjudicate upon its wisdom, appropriateness or necessity if the law prescribing it is validly made;

(5) all criminal law involves classification of individuals for purpose of punishment. Equality before the law and equal protection of the law require that like should be compared with like. What article 8(1) assures to the individual is the right to equal treatment with other individuals in G similar circumstances. Everybody charged under section 57(1) of the Internal Security Act, 1960, is liable to the same punishment and therefore it is not discriminatory;

(6) It is the function of the legislature not the judiciary to decide the appropriate punishment for persons charged under the Internal Security H Act and the Arms Act. Provided that the factor which Parliament adopts as constituting the dissimilarity in circumstances which justifies dissimilarity in punitive treatment is not purely arbitrary but bears a reasonable relation to the object of the law there is no inconsistency with article 8(1) of the Constitution. Article 8(1) is concerned with equal punitive treatment for similar legal guilt, not with equal punitive treatment I for equal moral blameworthiness;

(7) there is nothing unusual in a capital sentence being mandatory and indeed its efficacy as a deterrent may be to some extent diminished of it is not.

[31] Following *Ong Ah Chuan (supra)*, and *Lau Kee Hoo (supra)*, we are of the considered opinion that the learned judge was not plainly wrong, nor had he erred in fact or in law in deciding that the present case before him is not a special case under s. 84 of the CJA which makes it imperative for him to refer the purported constitutional questions, in particular the third question, to the Federal Court for a decision. The questions are not new as can be seen from the numerous cases which have been decided on the matter.

[32] The appellant further submitted that the court, in the exercise of its interpretative jurisdiction, shall also have regard to the Universal Declaration of Human Rights 1948 ("UDHR") as an aid to interpreting Part II of the Federal Constitution. The UDHR has been statutorily recognised as such an aid for Malaysia's Human Rights Commission in its duties to uphold human rights in Malaysia (see s. 4(4) and s. 2 of the Human Rights Commission of Malaysia Act 1999). In this regard, s. 39B(1)(a) of the DDA read together with s. 39B(2) of the DDA fail to afford fundamental rights of due process in the imposition of the mandatory death sentence with the result that the sentence provided for by s. 39B(1)(a) of the DDA read together with s. 39B(2) of DDA constitute an arbitrary deprivation of life. This is contrary to art. 5 of the Federal Constitution.

[33] The appellant further submitted that s. 39B(1)(a) of the DDA read together with s. 39B(2) of DDA are incompatible with the requirement that the death penalty may only be imposed after a judicial hearing where the sentence is not mandated in advance and/or where all mitigating factors relevant to the individual and the commission of the offence may be taken into account by the court in determining whether such a penalty is appropriate in the individual case. The said provisions result in arbitrary and grossly disproportionate penalties including by reason of the excessively broad definition of "trafficking" in s. 2(1) of the DDA.

[34] The appellant relied on several international law cases to emphasise the point that there is now an "emerging recognition that the imposition of the mandatory death penalty is cruel and/or inhuman and amounted to an arbitrary deprivation of life" (see Indian Supreme Court cases of *Bachan Singh v. The State of Punjab* (1980) 2 SCC 684, and *Mithu v. State of Punjab* [1983] 2 SCR 690, US Supreme Court case of *Woodson v. North Carolina* [1976] 428 US 280, Belize Privy Council case of *Reyes v. The Queen* [2002] 2 AC 235, Jamaica Privy Council case of *Watson v. The Queen (Attorney-General for Jamaica Intervening)* [2005] 1 AC 472, Uganda Constitutional

A Court and Supreme Court cases of *Kigula v. Attorney General of Uganda* (dated 10 June 2015 and 21 January 2009 respectively, both unreported, but in the High Court ABOA Tab 19 p. 551), and the Kenya Court of Appeal case in *Mutiso v. Republic of Kenya* Criminal Appeal No. 17 of 2008 (Judgment dated 30 July 2010) (see High Court ABOA Tab 20 p. 629).

B **[35]** The appellant submitted that reference to the Federal Court will resolve the dispute by speedy and economical end as provided in s. 84(2) of the CJA.

[36] While we agree with the appellant's submissions that both the High Court and this court have no jurisdiction to decide on constitutional question, C we do not think that by the mere filing of the application under s. 84 of CJA, it is an automatic right of the appellant, and therefore the automatic duty of the High Court, to refer the purported constitutional questions to the Federal Court for a decision if the application did not pass the "special case" test stipulated in s. 84 of the CJA, and rr. 32 and 33 of the RFC 1995.

D **[37]** We further considered the following r. 76 of the Rules of the Court of Appeal 1994 ("RCOA") which was cited to us by learned counsel for the appellant:

> **76. Ancillary powers of the Court**
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> E The Court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.

F **[38]** In light of our decision holding that the learned judge was not plainly wrong in the exercise of his discretion in not finding the appellant's case as a special case for the three questions to be referred to the Federal Court, we are not persuaded by learned counsel for the appellant that this court shall G exercise its powers under r. 76 of the RCOA in this appeal to refer the three questions to the Federal Court. Alternatively, neither do we think it necessary for us to order that the case be remitted to the High Court for the said court to refer the three questions, in particular the third question, to the Federal Court for a decision pending the trial.

H **[39]** We are of the firm opinion that the function of the courts is to interpret the law, and not to declare the mandatory death penalty under the impugned provisions of the DDA as unconstitutional. It is the Legislature, being the policy-maker, which has to amend the DDA and abolish the mandatory death sentence if it thinks that it is cruel and harsh, and a draconian law

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which is not in keeping with international trends, and "is inconsistent with the Federal Constitution for being arbitrary and disproportionate and for failing to take into account individual mitigating circumstances".

[40] Finally, it is appropriate for us to restate what Raja Azlan Shah (as His Royal Highness then was) said in the celebrated Federal Court case of *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187 at p. 188 (MLJ):

> The question whether the impugned Act is "harsh and unjust" is a question of policy to be debated and decided by Parliament, therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd. v. London Society of Compositors*(1):
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> > Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.
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> It is the province of the courts to expound the law and "the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction" – per Roskill LJ in *Henry v. Geopresco International Ltd*.(2) Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature, and not the courts, they have their remedy at the ballot box.

Conclusion

[41] Based on the foregoing considerations, we find no merit in the appeal. The appeal is dismissed and the decision and order of the High Court is affirmed.